Filed 3/27/17 P. v. Abrams CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS FRANCISCO ABRAMS, JR.,

Defendant and Appellant.

F072560

(Super. Ct. No. F09906199)

OPINION

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Jon N. Kapetan, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Peña, J.

Appellant Luis Francisco Abrams, Jr. appeals from the denial of his application for resentencing under Penal Code section 1170.18, seeking modification of the sentence imposed on his prior conviction for unlawfully driving or taking a vehicle (Veh. Code, § 10851). Appellant contends that his conviction under Vehicle Code section 10851 is eligible for resentencing under Proposition 47 and that the trial court should have held a hearing on the value of the car in question. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 13, 2009, appellant pled no contest to charges of unlawfully driving or taking a vehicle under Vehicle Code section 10851 and evading an officer, and further admitted to enhancements from four prior convictions. Appellant received a two-year sentence.

On February 23, 2015, appellant filed an application for reduction of felony conviction, seeking resentencing for the Vehicle Code section 10851 conviction, and several other charges not relevant to this appeal, under Proposition 47. No opposition was filed and, at least according to the record provided on appeal, no hearing was held on appellant's application. Rather, the trial court denied appellant's application with prejudice on the ground appellant was ineligible for relief "as his or her conviction(s) do not qualify for relief" under the relevant statutory code.

This appeal timely followed.

DISCUSSION

Appellant argues that, on its face, a violation of Vehicle Code section 10851 is a theft offense, subject to resentencing under Penal Code section 1170.18. Appellant further argues that treating a conviction for theft of an automobile under Vehicle Code section 10851 as a felony while other similar property thefts are treated as misdemeanors under Penal Code section 490.2 would create constitutional difficulties by violating equal protection principles. We have previously addressed both issues in *People v. Sauceda*

(2016) 3 Cal.App.5th 635 (*Sauceda*), review granted November 30, 2016, S237975.[1] In *Sauceda*, we held that Vehicle Code section 10851 is not affected by the changes enacted through Proposition 47 and that no equal protection violation arises from the different potential punishments for, or the failure to grant retroactive sentencing relief to, those convicted under Vehicle Code section 10851. (*Sauceda, supra*, at pp. 644-650.) We see no reason to depart from those rulings here.

Related to these arguments, appellant also argues that a conviction under Vehicle Code section 10851 must be eligible for resentencing because it is a lesser-included offense to grand theft auto, which is eligible for resentencing when the value of the vehicle is less than $950. We do not agree. As explained in *Sauceda*, a conviction under Vehicle Code section 10851 does not require an explicit determination of intent to steal. (*Sauceda, supra*, 3 Cal.App.5th at pp. 643, 644-646.) Thus, evidence of theft is unnecessary to satisfy the elements needed for conviction. The fact that, in some limited circumstances, Vehicle Code section 10851 can serve as a lesser included offense to theft of an automobile (whether grand or petty theft under Proposition 47), does not change the fact that the ultimate conviction is not necessarily for a theft offense. Because Vehicle Code section 10851 is not by its nature purely a theft offense, its exclusion from Proposition 47 confirms there was no intent to modify the punishment scheme separately set forth for the crime of unlawfully driving or taking a vehicle.

Ultimately, the burden of proof is upon appellant to demonstrate in his application that he is eligible for relief. (Pen. Code, § 1170.18, subd. (g) ["If the application satisfies the criteria in subdivision (f) …."]; *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 ["We think it is entirely appropriate to allocate the initial burden of proof to the petitioner

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1 Effective July 1, 2016, California Rules of Court, rule 8.1115(e)(1) was amended to provide that a published opinion of a Court of Appeal has no binding or precedential effect once the matter is pending review in the Supreme Court and "may be cited for potentially persuasive value only."

to establish the facts upon which his or her eligibility is based."]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449 [burden on petitioner to show value of stolen property was less than $950].) Appellant's bare assertion of conviction under Vehicle Code section 10851 is insufficient to do so.

DISPOSITION

The order is affirmed.